82-2138

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Case No.
IN THE SUPREME COURT
TERM: October 1, 1982

GERALD B. WOLFGRAM, Next Friend of DANIEL WOLFGRAM, FAYE I. WOLFGRAM, GERALD B. WOLFGRAM, jointly and severally,

Plaintiff-Appellants,

vs

BOMBARDIER LIMITED,

Defendant-Appellee.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS FOR REVIEW

DID THE TRIAL COURT DENY PLAINTIFF HIS RIGHT TO A FAIR TRIAL BY JURY WHEN IT INSTRUCTED THAT A DEFENDANT HAS NO DUTY TO GUARD AGAINST INJURY RESULTING FROM WEAR AND DETERIORATION OF PARTS?

DID THE TRIAL COURT DENY PLAINTIFF HIS RIGHT TO A FAIR TRIAL BY JURY WHEN, AFTER SUBSTANTIAL EVIDENCE OF CONTRIBUTORY NEGLIGENCE WAS PRESENTED, THE COURT REFUSED TO INSTRUCT THE JURY THAT CONTRIBUTORY NEGLIGENCE WAS NO DEFENSE?

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The Opinion of the United States District Court for the Eastern District of Michigan, Northern Division, denying plaintiff's motion for a new trial on February 3, 1981, Reprinted in the Appendix at pages 19 through 21.

The Opinion of the United States Magistrate of the United States District Court, Eastern District of Michigan, Northern Division, Denying plaintiff's motion for a new trial, entered November 24, 1981, Reprinted in the Appendix at pages 22 through 35.

GROUNDS OF JURISDICTION

This action was initially commenced in the United States District Court for the Eastern District of Michigan, Northern Division. Jurisdiction was based on diversity of the parties, 28 USC 1332.

The case was assigned to the District Court magistrate for a trial. The jury returned a verdict of no cause of action. Plaintiff moved for a new trial. This motion was denied by both the magistrate and the United States District Court, Judge James Harvey presiding.

Plaintiff timely appealed to the Sixth Circuit Court of Appeals which affirmed the judgment below on September 7, 1982. A petition for rehearing was denied by the Sixth Circuit Court of Appeals on May 3, 1983.

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of 28 USC 1254.

CONSTITUTION PROVISIONS

This action seeks a review of jury instructions, erroneously given or omitted, which infringe upon plaintiff's constitutional right to a fair trial by jury guaranteed by the U S Constitution, Amendment VII:

> TRIAL BY JURY IN CIVIL CASES. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner adopts the statement of the facts as set forth by the Sixth Circuit Court of Appeals in its opinion, reprinted hereafter.

Plaintiff Gerald Wolfgram (Wolfgram) appeals a judgment of "no cause of action" entered upon a jury verdict for defendant Bombardier Limited (Bombardier) in this diversity products-liability action. Wolfgram and several friends had been snowmobiling one evening when a Ski-Doo snowmobile manufactured by defendant Bombardier and owned by Randall Larson developed mechanical difficulties: the engine was not delivering power to the track. With the engine running, the cowling which enclosed the front of the machine was removed exposing the engine and a drive pulley system which delivered power from the engine to the drive pulley by a clutch and belt mechanism. Two youths lifted the rear of the unit and a third "revved" the engine. The spinning clutch spring unwound from the cam and shaft and flayed the inside of a partial guard

which enclosed the pulleys. Plaintiff Wolfgram, who was observing the operation, was struck by a projectile propelled by this flaying. He was blinded in one eye. Wolfgram initiated a diversity action upon theories of negligent design and breach of implied warranty which resulted in a jury verdict of no cause of action. This appeal ensued.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

A. THE JURY INSTRUCTION BY THE TRIAL COURT THAT A MANUFACTURER HAS NO DUTY TO GUARD AGAINST INJURY RESULTING FROM WEAR AND DETERIORATION OF PARTS DENIED PLAINTIFF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY JURY.

The long recognized duty of the Court in a jury trial is to define the duty of the respective parties and properly instruct the jury on this duty. The court in the instant case instructed the jury in part as follows:

> "The defendant manufacturer is not under a duty to provide replacement of worn parts nor is it under a duty to guard against injury resulting from wear and deterioration of parts. Likewise, the law does not impose a duty upon the manufacturer to supply materials that will not wear out and the manufacturer does not have to anticipate that maintenance will be neglected." (Appendix p. 36) (Empnasis added)

The trial transcript of this action indicates the instruction given omitted the words "injury resulting from" in the foregoing instruction. (Appendix p. 37-38 (Tr 805)) However, the instructions were given as written, not as the record indicates. A comparison of the

written instructions with the transcript indicates numerous inconsistencies and omissions from the record. It is inconceivable that the court, reading the instructions, would have deviated on so many occasions. It is also inconceivable that counsel, following the written instructions as the court read them, would not have noted at least a portion of such errors. The instruction, as written and read to the jury, was erroneous. Also, neither the Court nor any party has contended that the transcript is superior in accuracy as compared to the written instructions as read to the jury.

The applicable law in Michigan for assessing a manufacturer's liability to persons injured by their product is whether the risk to the plaintiff is unreasonable and foreseeable by the manufacturer. Smith v E R Squibb & Sons, 405 Mich 79; 273 NW2d 476 (1979); Piercefield v Remington Arms Co, 375 Mich 85; 133 NW2d 129 (1965); Snears v Pardonnet, 80 Mich App 358; 263 NW2d 373 (1977); Casey v Gifford Wood Co, 61 Mich App 208; 232 NW2d 360 (1975); Coger v Mackinaw

Products Co, 40 Mich App 113; 210 NW2d 124 (1973). Michigan law has long recognized that a manufacturer owes a legal obligation or duty to persons within the foreseeable scope of the risk by the manufacturer's conduct in marketing a product. Moning v Alfono, supra; Piercefield v Remington Arms Co Inc, supra. When designing a product, the manufacturer is under a duty to use reasonable care to guard against unreasonable and foreseeable risks. Byrnes v Economic Machinery Co, 41 Mich App 192; 200 NW2d 104 (1972). Where an injury is reasonably foreseeable, it is for the jury to determine whether, as a practical matter, a safety device which should have been put on the product was inadequate. Jennings v Tamaker Corp, 42 Mich App 310; 201 NW2d 654 (1972).

In the instant case, the Trial Court improperly instructed there was no duty to guard against injury resulting from wear and deterioration of parts. The manufacturer had a duty to guard against unreasonable and foreseeable risks. It is for the jury to

determine whether the manufacturer's actions in placing the guard on the product were an exercise of reasonable care. The Trial Court removed this issue from the jury's consideration by giving the aforesaid instruction.

The error, as above set forth, affected the substantial rights of the petitioner, denying him his right to a fair trial by jury and warranting a new trial. Federal Rules of Civil Procedure 61.

The erroneous instruction was severely prejudicial to appellant's case because it completely undermined his theory of the case and was tantamount to a directed verdict of no liability in favor of appellee. In Instruction 30A-1 (Appendix p. 36), the jury was instructed that it is the duty of a manufacturer to use reasonable care under the circumstances to design his product. The court then went on to instruct the jury that there was no duty to guard against injury resulting from wear and deterioration of parts and that a manufacturer does not have to anticipate that maintenance will be neglected.

(Appendix p. 36) Based on the facts of this case, the jury obviously concluded that appellee exercised reasonable care being under no duty to guard against the very circumstance that was the cause of appellant's injury. If this were the rationale followed, the jury would never reach the key issue of the case and the issue upon which appellant' entire case was founded; that being whether or not the partial guard placed on the snowmobile by appellee was an inadequately designed safety device. Under the instruction as given, appellee could have put no guard, whatsoever, around the rotating pulleys and been in breach of no duty owed appellant. Putting even an inadequate guard around the rotating pulley system was more than what the law required appellee to do according to instruction 30A-1. Under such instruction, a jury could never conclude that the guard was inadequately designed.

Improperly instructing the jury in this manner was tantamount to a directed verdict for the defendant. The jury could not have

followed this instruction and rendered a verdict for the plaintiff. Even considering the effect of the instructions as a whole, petitioner was prejudiced. The Court gave various general instructions. It then gave this instruction, specifically advising the jury that the defendant had no duty to guard against injury resulting from wear and deterioration of parts. This specific instruction overrules the general instructions. Its prejudicial effect is not lessened by general instructions properly stating the law.

A safety guard (as in this case) must guard against injury from worn and deteriorating parts. Such protection is the express purpose of a guard. The guard must protect the consumer from flaying and flying parts that exit the machine for whatever the reason, whether worn, defective, used, abused, misused, deteriorating or just plain tired. Thus, the manufacturer has such a duty and the Court's instruction to the contrary can be none other than severely prejudicial error. The jury could not

obey the instruction and find for plaintiff.

B. THE COURT'S REFUSAL TO INSTRUCT THE JURY THAT PLAINTIFF'S CONTRIBUTORY NEGLIGENCE WAS NOT A DEFENSE DENIED PLAINTIFF HIS RIGHT TO A FAIR JURY TRIAL WHEN THE JURY HAD BEEN EXPOSED TO SUBSTANTIAL EVIDENCE OF CONTRIBUTORY NEGLIGENCE DURING THE TRIAL.

Plaintiff in this action specifically requested, and the Court denied, that the jury be instructed contributory negligence was no defense in this action. (Appendix p815-8) This instruction was crucial for a fair trial in several ways:

1. The defendant asserted contributory negligence as a defense and presented evidence on that issue. It was not until argument on jury instructions that the defendant withdrew this defense.

2. The failure to give this instruction left the jury without any guidance on what evidence it could or could not consider in determining defendant's breach of warranty

or negligence.

3. It has been common knowledge in Michigan for many years prior to Placek v City of Sterling Heights, 405 Mich 638; 275 NW2d 511 (1979) that contributory negligence was an absolute defense to liability. The jury was not instructed that this rule did not apply to plaintiff's claim.

The dissenting opinion of Judge Jones in the Sixth Circuit Appeal specifically points out the presentation of the contributory negligence during the trial. Judge Jones states:

> "The contributory negligence issue was presented in several ways during the course of the trial. The defendant pursued the issue of whether plaintiff, then under legal age, had been drinking beer on the evening of the accident. Also, the defendant's theory of the case, read to the jury, emphasized the hard use to which the snowmobile was subjected, neglect of maintenance, and plaintiff's own proximity to the machine as its rear end was lifted and it was revved to its maximum capacity. Furthermore, the jury was made aware of the defendant's interrogatory answer asserting reliance upon contributory negligence."

With all the foregoing evidence before it, the jury required a proper instruction on what evidence could or could not be considered in arriving at a verdict. Even though, in practice, the jury must consider the issue of defendant's negligence before any question of plaintiff's contributory negligence is considered, there is no way to guarantee contributory negligence was not considered. Plaintiff was entitled to this instruction to eliminate the substantial risk that the jury's practice would diverge from theory. Keeble v United States, 412 US 205, 212 (1973).

Contributory negligence as an absolute defense had been the rule in Michigan's legal history until February 1979. With such a longstanding history, it had become common knowledge throughout the community and was not restricted to only legal experts. When comparative negligence was adopted in Michigan by the Supreme Court's ruling in Placek v Sterling Heights, 405 Mich 638; 275 NW2d 511 (1979), this defense changed. No longer was it an

defense, but only a partial defense. However, the lay persons in the community may not have been aware of this change in August 1980 when the instant action was tried. Certainly the jury was entitled to an appropriate instruction on the changes in the law and whether the defense applied in this action.

Witnout a properly instructed jury, plaintiff was in the position of having the jury decide his case based upon conjecture as to the applicable law. They had heard substantial testimony on plaintiff's own negligence. No guidance was presented to the jury relating to that evidence. It would result in the deprivation of justice and a fair trial to allow a verdict by an improperly instructed jury to stand.

If the instant action had been tried in Michigan, petitioner would have been entitled to an instruction on this issue. Included within the Michigan Standard Jury Instructions is the following instruction:

> "You must not consider whether there was negligence on the part of the

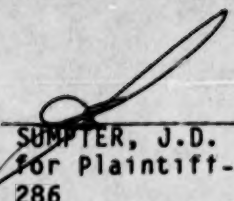
[plaintiff/plaintiffs], because _____." SJI2d 11.02

The refusal to give an applicable instruction embodied within the Michigan Standard Jury Instruction mandates automatic reversal, even if the issues were raised only by the plaintiff. Socha v Passino, 405 Mich 458; 275 NW2d 243 (1979)

To refuse to give the requested instruction in this case allows the federal court to be used as a refuge to avoid the advancing law of products liability in Michigan. Petitioner is entitled to the same substantive and procedural protection in both State and Federal Courts. To refuse to give this protection denies the petitioner the constitutionally mandate fair trial by a jury properly instructed on the applicable law.

WHEREFORE, plaintiff prays the Honorable Justices of this Supreme Court grant his petition for writ of certiorari in this action.

Dated: June 23, 1983



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